BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

IN THE MATTER OF THE ARBITRATION	)	
	)	
Between	)	
	)	**Case# 06-PA-66**
INDEPENDENT SCHOOL DISTRICT #15	)	
	)	
And	)	
	)	**John Remington,**
	)	**Arbitrator**
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 284	)	
	)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a grievance arising from the discharge of Perry Smith, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on December 19, 2005 in St. Francis, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they did subsequently file on January 3, 2006.

The following appearances were entered:

For the Employer School District:

Paul C. Ratwick	Attorney at Law
Sonja J. Guggemos	Attorney at Law

For the Union:

Shelly Johnson	Business Representative

THE ISSUE

DID THE EMPLOYER HAVE JUST CAUSE TO DISCHARGE GRIEVANT PERRY SMITH AND, IF NOT, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISIONS AND POLICIES

ARTICLE XII
GRIEVANCE PROCEDURE

Section 6. Mediation Level: Upon request of the Union, the School District agrees to participate in a meeting set by the Bureau of Mediation Services to consider any grievance not resolved in Subd. 3, Level III hereof, provided the Union makes such request within ten (10) days after receipt of the School District's decision in Subd. 3, Level III hereof. If the grievance is considered at this mediation level and is unresolved, the matter may be appealed to arbitration pursuant to Section 8 hereof, provide notice is filed within ten (10) days after the mediation meeting as provided in this section. Nothing in this section shall preclude the Union from bypassing this mediation level and appealing directly to arbitration from the Subd. 3, Level III, decision by the School District.

……

Section 8. Arbitration Procedures: In the event that the employee and the School District are unable to resolve any

grievance, the grievance may be submitted to arbitration as defined herein:

Subd. 1: Intent An intent to submit a grievance to arbitration must be in writing signed by the aggrieved party, and such notice must be filed in the Office of the Superintendent within ten (10) days following the decision in the Level III of the grievance procedure, or within ten (10) days following the mediation as provided in Section 6 hereof if the Union elects to consider the matter at the mediation level.

Subd. 2. Prior Procedure Required: No grievance shall be considered by the arbitrator which has not been first duly processed in accordance with the grievance procedure and appeal provisions of this agreement.

……

Subd. 5 Decision: The decision by the arbitrator shall be rendered within thirty (30) calendar days after the close of the hearing. Decisions by the arbitrator in cases properly before him/her shall be final and binding upon the parties, subject, however, to the limitations of arbitration decisions as provided for in the PELRA.

……

Subd. 7 Jurisdiction: The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as define herein and contained in this written Agreement.

ARTICLE XIII
PROBATION, DISCIPLINE AND DISCHARGE

Section 3. Discipline and Discharge:

Subd. 1. The School District shall have the right to discipline employees who have completed the probationary period only for just cause.

Subd. 2. Disciplinary actions by the School District shall include the following four steps as warranted: 1) oral reprimand; 2) written reprimand; 3) suspension without pay; 4) discharge.

Subd. 3. Employees who are to be discharged or suspended shall be notified in writing of such action together with a statement of the reason(s) for discharge or suspension, a copy of which shall be sent to the Union.

District Policies

Independent School District 15

556 EMPLOYEE ATTENDANCE

Each employee is required to work the hours normally scheduled for his or her position……

The District defines its attendance policy in these terms:

1) Absence. The failure of an employee to report during the hours he or she is normally scheduled to begin.

2) Tardiness. This occurs when an employee is not on the job at the time work is normally scheduled to begin.

3) Excused absence. This occurs when an employee notifies his or her immediate supervisor or designee of an upcoming absence for an acceptable reason such as illness, personal or family emergency, or other acceptable reasons. The supervisor must give the employee permission to be absent and note such permission in writing for the absence to be considered "excused." Rare exceptions may be permitted in cases where employee notification odes not occur.

4) Unexcused absence. This is defined as an employee's failure to notify the immediate supervisor of absence prior to the normally scheduled work time, or an employee's decision to be absent even though supervisory permission was not granted when requested ahead of time.

BACKGROUND

Independent School District #15, hereinafter referred to as the "EMPLOYER" or "DISTRICT," operates the public schools in and around St. Francis, Minnesota and is a public employer within the meaning of Minnesota Statutes. Custodial, maintenance and laundry employees of the District are represented, for purposes of collective bargaining, by the Service Employees International Union and its School Service Employees Local 284, hereinafter referred to as the "UNION." Perry Smith, the Grievant in this matter, had been employed by the District as a "Maintenance" worker for approximately ten (10) years when he was discharged on January 24, 2005 for excessive absenteeism and for failure to call in and promptly provide documentation in connection with this absenteeism.

The record of the hearing reveals that Grievant was issued a "Letter of Reprimand" by his immediate supervisor, Jim Heckenlaible, on March 4, 2004 for failure to properly complete his work assignments and abuse of sick leave. This written reprimand was not grieved. Grievant had previously received two memoranda from Heckenlaible in January and April of 2003 concerning what Heckenlaible perceived to be the possible abuse of sick leave on Grievant's part. The Employer's attendance records reflect that in 2002-03 Grievant was absent from work for 36.15 days including 14.6 days of sick leave and 1.55 days of unpaid leave. In 2003-04 he was absent 43.32 days including 16.99 days of sick leave and 5.33 days of unpaid leave. [1]

Grievant was issued a second letter of reprimand by Human Resources Director Jay Reker on July 21, 2004 for being absent from work without calling in on July 12 and July 15, 2004. This letter states, in relevant part:

[1] The use of unpaid leave indicates that Grievant had exhausted all of his paid leave.

> Therefore, because you did not give notice or request the use of sick leave, vacation leave, or personal holiday leave and were absent without your supervisor's consent, the District will be docking you two (2) day's pay for July 12, 2004 and July 15, 2004 taken (off) without notification or consent.
>
> Furthermore, the District directs you to follow procedures and give proper notice of your intent to use sick, vacation, and/or personal leave. Failure to provide this notification will result in a suspension of one (1) to five (5) days without pay. Further violations of this nature may result in your immediate discharge.

On November 1, 2004 Grievant was notified that since he had performed no paid work for the Employer since October 12, 2004, he had no payroll checks from which to deduct his share of health insurance premiums. Accordingly, Grievant was offered continuation of insurance benefits through COBRA. The following day Reker sent a letter to Grievant concerning his "Unauthorized Absence from Work." This letter states:

> As of the date of this letter you have now failed to report for 17 consecutive days of work, since October 8, without providing a medical excuse from a doctor as required by Jim Heckenlaible's letter to you dated April 9, 2003. During the same period of time, you have also, with very limited exception, failed to follow procedures and give advance notice that you would not be able to work due to illness.
>
> Even if you provide a medical excuse and advance notice of absences due to illness, future absences will be without pay. You have exhausted all sick leave, floating holidays and vacation allocated to you under the collective bargaining agreement……
>
> Your unexcused absences are causing a serious staffing issue for the District that cannot be allowed to continue. Accordingly, I am directing you to either report for duty immediately or to provide a physician's statement as to the nature of any illness preventing you from reporting and stating the expected duration of your absence. In either event, the District reserves its right to require you to

> undergo a health examination, at District expense, by a licensed physician. See Article XV, Section 1 of the Agreement between ISD #15 and Local 284.
>
> In the event that you do not promptly comply with this directive, you can expect to be summoned to a meeting to discuss your absences, your failure to comply with directives you have received regarding absences and the impact of both upon your continuing employment with the School District.
>
> ……;…

The above referenced meeting was not convened until January 7, 2005 after Grievant had finally returned to work on January 3. However, Reker sent Grievant another letter on December 23, 2004 noting Grievant's continued failure to call in and/or provide a medical excuse for his absences. This letter cites nineteen (19) incidents of Grievant's unexcused absences that occurred between November 23, 2004 and December 23, 2004. A copy of the above cited November 2, 2004 letter was attached. Finally, on January 3, 2005 Grievant was requested, by letter, to come to Reker's office for the above noted January 7 meeting.

Grievant was issued a letter of termination by the School Board Chair, pursuant to action by the Board, on January 24, 2005. This letter states:

> This letter constitutes formal notification of the termination of your employment by Independent School District No. 15, the St. Francis Public Schools. I have enclosed a copy of the resolution of termination adopted by the School Board at its meeting on Monday, January 24, 2005.
>
> The basis for the termination is your continuing pattern of failing to give advance notice of your absences, failing to provide a doctor's or psychologist's excuse for your absences in a timely manner, leaving work during the work day and abusing sick leave by claiming to be ill and then being seen doing non-work related activities around town.

> Each of these issues was discussed with you during our meeting on Friday, January 7, 2005. Additionally, these issues were reviewed in the November 2, 2004, December 23, 2004 and January 3, 2005 letters of Mr. Jay Reker, the District's Director of Human Resources. Mr. Reker's letter of January 3, 2005 also provided you with copies of pervious warnings and directives regarding these issues that you have received over the period of the last two years.

A copy of this termination letter was provided to the Union. The Union responded by filing a "Grievance Form" on Grievant's behalf on January 26, 2005. This grievance cites an alleged violation of Article XIII, Section 3 in that Grievant "has no record of oral reprimand or suspension without pay" in connection with his attendance and contends that Grievant was "unjustly fired." The grievance asks, in remedy, that Grievant be reinstated with back pay.

The grievance was duly processed through the negotiated grievance procedure. Although the Employer raised a question of procedural arbitrability in connection with the Union's appeal to arbitration following mediation, that question was resolved by this Arbitrator in a separate award issued on December 9, 2005 in which he held that the grievance is arbitrable within the meaning of the parties' collective agreement. Accordingly, this matter is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Employer takes the position that there is ample evidence within the record to establish that Grievant failed to comply with the School District's reasonable policies and directives concerning attendance and that he was therefore progressively disciplined and ultimately terminated for just cause. It argues that Grievant had a long history of failing

to promptly call in prior to his absences or to provide documentation for sick leave use, and that these absences negatively impacted his job performance and were detrimental to maintenance work district wide. It maintains that although Grievant did ultimately provide some documentation for his sick leave absences, this documentation was not submitted in a timely manner and the physicians' notes did not cover all of the dates that Grievant had claimed to be ill or at the doctor. The Employer further takes the position that the apparent improvement in Grievant's attendance in January of 2005 was insufficient to overcome his past pattern of poor attendance; that his explanation for this poor attendance was less than credible; and that there was nothing to suggest that the above apparent improvement would be permanent. Finally, the Employer maintains that it had no obligation under the collective agreement to formally suspend Grievant without pay prior to terminating him.

The Union takes the position that Grievant's termination was not justified in that the Employer ignored Grievant's documented medical condition and failed to follow the progressive disciplinary procedure outlined in the collective bargaining agreement. The Union argues that the Employer was fully aware of Grievant's medical problems and that the Employer ignored Grievant's good attendance in January of 2005 after he had returned to work with his medical condition at least somewhat resolved. The Union also argues that the Employer failed to take disciplinary action against Grievant in a timely manner. While the Union concedes that Grievant missed a significant amount of work during 2004, it contends that most of his absences were excused or approved and that the medical documentation requested by the Employer was ultimately provided. The Union therefore urges that the grievance be sustained.

DISCUSSION, OPINION AND AWARD

There can be no doubt that Grievant's overall attendance during 2004 was unsatisfactory and that he violated the above noted District Attendance Policy by failing to call in prior to many of these absences. Indeed, he rarely appeared at work during the last six months of the year. Attendance records provided by the Employer (Employer Exhibit #30) reveal that Grievant only worked forty-two (42) days from July through December of 2004 and that he failed to call in on thirteen (13) occasions to advise the Employer of his absence. However, it is clear from the record of the hearing that Grievant's attendance problems began some time during the 2002-03 school year and continued into 2003-04 as evidenced by the fact that he exhausted all of his contractual leave during both of these years and was forced to take additional time off work without pay. Indeed, on two occasions in early 2003 Grievant's immediate supervisor counseled him concerning his use of sick leave and what appeared to be a pattern of Monday absences. It was Heckenlaible's undisputed testimony that he was getting calls from the various schools where Grievant had been assigned complaining about Grievant's absences. Because of this concern over the use and possible abuse of his sick leave, Grievant was put on written notice regarding the Employer's sick leave policy and required to provide physician's slips when he utilized sick leave. By April 9, 2003 Grievant was aware, or should have been, that the Employer considered his attendance and use of sick leave to be unsatisfactory and that physician's slips documenting illnesses or doctor's visits were required.

Apparently Grievant's attendance improved somewhat during the latter part of 2003 and he received no additional warning concerning use of sick leave. However, in March of 2004 Grievant was given a letter of reprimand for poor attendance and poor job performance. Although the record indicates that Grievant's overall job performance during the ten years of his employment was apparently satisfactory, the poor job performance cited in the March 2004 reprimand appears to have been again related to Grievant's poor attendance. As a Maintenance worker, Grievant worked independently without close supervision and reportedly had failed to complete tasks prior to leaving a school building worksite and/or failed to return to complete tasks he had begun. Grievant did not contest this discipline through the grievance procedure and accordingly acknowledged his culpability for the charges of poor job performance and poor attendance. He further acknowledged the warning that more serious discipline could result if his job performance and attendance did not improve.

Grievant contends that he was suffering from depression during much of the period from 2002-2004. However, he admittedly was neither diagnosed nor sought treatment for this condition until late in 2004. He further contends that his condition was either resolved or under control when he returned to work on January 3, 2005. Despite his claim of a medical condition (psychological depression) that prevented him from working during much of 2004, the documentation presented by Grievant supporting this claim was untimely and, in some cases inconsistent, and incomplete. Further, Grievant never indicated or presented documentation of continuing treatment for depression after October of 2004; never requested an accommodation because of his alleged illness; and rejected the Employer's offer of medical leave. While the Arbitrator does not question

the "diagnostic assessment" provided by Grievant's licensed psychologist, it is very difficult to accept Grievant's claim that all of his attendance problems were due to his "medical condition," particularly those related to his attendance in 2002 and 2003.

Grievant was issued a second written reprimand for poor attendance in connection with what the Employer deemed to be improper use of vacation in July of 2004. In this instance he was absent and failed to call in on July 12 and again on July 15, 2004. He was therefore "docked" two days' pay for these absences, effectively a two day suspension without pay. Again, Grievant elected not to contest this discipline through the grievance procedure and thereby accepted the discipline. On November 2, 2004, Grievant received a letter from Reker concerning Grievant's "unauthorized absence from work." This letter can only be characterized as a final warning to Grievant that his poor attendance and continued failure to call in would have a negative impact on his "continuing employment" with the District. At this point Grievant had been absent from work since October 11, 2004 but had not failed to call in since he had been absent three consecutive days the prior month. Following this warning Grievant was absent for sixteen (16) consecutive days through November 24 and only called in for nine (9) of these absences.[2] Apparently Grievant was not totally disabled during this period and was cognizant of the District's attendance policy since he was able to call in for over half of his absences. Grievant worked only four days until December 2, 2004 and then was absent for the remainder of December. He failed to call in only once during this latter period.

[2] November 25, 2004 was Thanksgiving Day and Grievant finally returned to work on Monday, November 29, 2004 but only worked a partial day.

The record reflects that Grievant visited Therapist Katie Susens, MA.LP on November 11, 2004. A copy of her report was faxed to the Employer the following day. Her report indicates that Grievant reported symptoms of depression including "non-restorative sleep, intense fatigue, ……loss of appetite, and …… poor motivation" leading Susens to the diagnosis that Grievant was suffering from "Major Depression" and Social Anxiety." Her report also reflects that Grievant had seen his family physician on November 4 and that this physician had prescribed "Zoloft," a common prescription anti-depressant drug. She notes that Grievant had agreed to return the following week for another session, and that the above noted depression and social anxiety were "new since October." Her FAX indicates that she would discuss Grievant's return to work with him on November 15. This appointment was canceled by the Therapist and re-scheduled for the following day, November 16. Following this appointment Susens reported to Reker that Grievant would return to work on November 22 and that he would "continue on his medication and will follow up with this therapist as needed." On November 22, Susens wrote a short note indicating that Grievant had reported having a panic attack on his way to work and would not be returning to work until the following day. There is no indication that Susens actually saw Grievant on November 22 or that she ever saw him again for treatment. As hereinabove noted, Grievant did not actually return to work until November 29 and did not call in his absences of November 22, 23 or 24.

At this point it is surprising that the Employer did not immediately move to terminate Grievant's employment. He had been warned and twice reprimanded concerning his poor attendance and failure to comply with the District attendance policy. Following the second disciplinary action he had only reported to work as scheduled on

forty-one occasions or 38% of the time. Perhaps the Employer was inclined to accept Susen's diagnosis and waited to see if the therapy and medication would impact Grievant's attendance. However, when Grievant's record of attendance during December of 2004 proved to be as inadequate as was his November attendance, and with no evidence that Grievant was continuing his therapy or medication, the Employer was compelled to issue Grievant another letter concerning his unsatisfactory attendance on December 23. Grievant finally returned to work (tardy) eleven days later on January 3, 2005 and then called in absent on January 4. He returned to work on January 5 and didn't miss a day until his termination on January 25.

Grievant argues that this fifteen (15) day period of regular attendance demonstrated that he had corrected his prior poor attendance pattern and that his disabling depression was under control. On the contrary, the Arbitrator finds that the Employer cannot be faulted for rejecting this argument and concluding that there was little reason to believe that Grievant's fifteen days of good attendance was more indicative of his willingness and ability to maintain a regular schedule than was his abysmal record of attendance for 2004. The record reflects that while Grievant may indeed have been suffering from depression in October and November of 2004, this condition was apparently improved through counseling and medication by late November. Nonetheless, Grievant did not return to work nor did he continue treatment. From the Employer's perspective, Grievant did not maintain a regular schedule, a failure that resulted in his work not being performed or being performed by others at extra expense. He compounded this poor attendance by frequently failing to call in his absences in violation of District policy. Further, there can be no doubt that Grievant

knew and understood this policy; knew that his attendance was unsatisfactory; knew that he would be disciplined and ultimately discharged for poor attendance; and knew on November 2, 2004 that his continued employment was in jeopardy because of his failure to comply with the Disctrict's reasonable attendance policies. It was only then that he "discovered" that his poor attendance was attributable to psychological depression. While this explanation may be true, it is very hard to believe in the face of Grievant's documented attendance and call-in record.

Brief final comment is warranted with respect to the Union's contention that Grievant was entitled to a progressive disciplinary suspension prior to being terminated. This argument must be rejected. Although it is true that Grievant received no formal disciplinary suspension for his attendance in 2004, it cannot be denied that the July 21 second reprimand, supra, was essentially a disciplinary suspension of two days. Further, given the fact that Grievant was rarely at work after October 8, 2004, it would have been meaningless in terms of corrective action for the Employer to discipline him in this fashion after November 1 since he was already off work without pay and only returned to work for three days through the end of the year. It is also true that Grievant was already on notice that failure to improve his attendance could result in discharge as indicated in both the July letter of reprimand and the November final warning. Under these circumstances the Employer had no obligation under the collective agreement to impose a meaningless disciplinary suspension prior to discharge.

The Arbitrator has made a thorough review and analysis of the entire record in this matter and has fully considered the various arguments advanced by the parties in their respective post hearing briefs. Further, he has determined that the crucial issues that

arose in these proceedings have been addressed above that certain other matters raised by the parties must be deemed immaterial, irrelevant or side issues at the very most and therefore has not afforded them any significant treatment, if at all, for example: the Employer's decision to not terminate Grievant until after a School Board hearing on the matter; whether or not the Employer ever required Grievant to take a physical examination at District expense; whether or not Susens provided a full diagnostic assessment of Grievant; whether or not the Employer ever considered suspending Grievant; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' collective bargaining agreement the Employer has demonstrated, by clear and convincing evidence, that it had just cause to terminate the employment of Grievant Perry Smith. As award will therefore issue, as follows:

AWARD

THE EMPLOYER HAD JUST CAUSE TO DISCHARGE GRIEVANT PERRY SMITH. THE GRIEVANCE PROTESTING THIS DISCHARGE MUST THEREFORE BE DISMISSED AS BEING WITHOUT SUBSTANCE OR MERIT.

_____
JOHN REMINGTON, ARBITRATOR

February 13, 2006
St. Paul, Minnesota